

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

KIM MARTINY,	:	APPEAL NO. C-081059
	:	TRIAL NO. A-0705002
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
IVY HILLS COUNTRY CLUB,	:	
	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Kim Martiny appeals from the trial court’s entry granting summary judgment in favor of defendant-appellee Ivy Hills Country Club and denying his motion for summary judgment. We affirm.

Facts

The facts of this case are largely undisputed. Martiny purchased a golf membership from Ivy Hills Country Club in 1991. His contract was with the then-owner, Zicka. In pertinent part, the contract provided that Zicka would reimburse Martiny 90% of his \$12,500 membership fee 30 years from the date of purchase. It also provided that, if Martiny were to “retire” from Ivy Hills, his membership fee would be refunded based upon a certain formula of new membership sales (“the wait-list liability”). Specifically, Zicka promised that it would reimburse one retired member for every four or five new “transferable” memberships it sold until club

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

membership reached 350. (The ratio appears differently in different parts of the record.) When club membership reached 350, Zicka promised to reimburse one retired member for every new member who joined the club at any level of membership.

Zicka sold Ivy Hills to American Golf Corporation (“AGC”) in 1998. It seems that AGC agreed to abide by all terms of the Zicka membership contract, but since AGC was not a party to this lawsuit, this is not entirely clear.

In 2005, CPG Ivy Hills purchased the country club from AGC. CPG Ivy Hills excluded from the sale the 30-year reimbursement obligation, but agreed to keep the wait-list liability. Martiny is currently third on the retired members’ waiting list. Club membership is below 350 members.

Martiny sued CPG Ivy Hills, asserting breach of contract, conversion, and unjust enrichment. Both parties moved for summary judgment. The trial court granted summary judgment in favor of CPG Ivy Hills.

In his first and second assignments of error, Martiny argues that the trial court erred by entering summary judgment in favor of CPG Ivy Hills and by denying his motion for summary judgment. Neither argument has merit.

Standard of Review

We review the trial court’s judgment de novo.² Summary judgment is appropriate if (1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and with the evidence construed

² *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241.

most strongly in favor of the nonmoving party, that conclusion is adverse to that party.³

Construing the evidence in a light most favorable to Martiny, we hold that CPG Ivy Hills was entitled to summary judgment as a matter of law. We also hold that the trial court correctly denied Martiny's motion.

None of Martiny's Claims Had Merit

To recover on a breach-of-contract claim, a plaintiff must demonstrate the existence of a contract, the plaintiff's performance, the defendant's breach, and damage or loss to the plaintiff.⁴ Here, it is undisputed that Martiny is on the waiting list for reimbursement under the terms of his original contract. And even if CPG Ivy Hills could be held liable for 90% of Martiny's membership fee 30 years from the date he purchased his membership, 30 years has not passed. So there was no breach and there was no damage.

Martiny failed to establish his conversion claim, as well. And CPG Ivy Hills was entitled to judgment in its favor. The elements of conversion are (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of the plaintiff's property rights; and (3) damages.⁵ Here, Martiny had no right to his membership fee at the time of any alleged "conversion," which presumably was the sale of CPG Ivy Hills.

³ Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; see, also, *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264.

⁴ *Brunsmann v. Western Hills Country Club*, 151 Ohio App.3d 718, 2003-Ohio-891, 785 N.E.2d 794, ¶11; see, also, *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, 878 N.E.2d 66, ¶18.

⁵ *Dice v. White Family Cos.*, 173 Ohio App.3d 472, 477, 2007-Ohio-5755, 878 N.E.2d 1105, ¶17; *Haul Transport of VA, Inc. v. Morgan* (June 2, 1995), 2nd Dist No. 14859; see, also, *Jones v. Bea*, 1st Dist. No. C-030261, 2004-Ohio-1115, ¶9.

Finally, we hold that the trial court correctly entered judgment on Martiny's claim for unjust enrichment. Unjust enrichment occurs when a party retains money or a benefit that in justice and equity belong to another.⁶ Based on the facts presented below, there was nothing "unjust" about CPG Ivy Hills failing to refund Martiny's membership fee.

We overrule both assignments of error. The judgment of the trial court is affirmed.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on August 26, 2009
per order of the Court _____.
Presiding Judge

⁶ *Holzman v. Fifth Third Bank* (Apr. 30, 1999) 1st Dist. No. C-980546; *Griffin v. Porco* (Apr. 24, 1996), 1st Dist. No. C-941013